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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Marta DeSoto,

10 Plaintiff,

11 v.

12 Gregory McKay,

13 Defendant.
14

No. CV-16-00996-PHX-JAT

ORDER

15 Pending before the Court are: (1) Defendant Gregory McKay's Motion to Strike
16 and Motion to Dismiss Plaintiff's First Amended Complaint ("FAC"), (Doc. 23);
17 (2) Plaintiff Marta DeSoto's Response to Defendant's Motion to Strike and Motion to
18 Dismiss, (Doc. 24); and (3) Defendant's Reply to Plaintiff's Response to [Defendant's]
19 Motion to Dismiss, (Doc. 25). The Court now rules on the Motions.

20 **I. BACKGROUND**

21 From 2009 to 2015, Plaintiff was employed on an independent contractor basis by
22 the Arizona Department of Child Safety ("DCS") and, DCS's predecessor agency, Child
23 Protective Services ("CPS"). (Doc. 21 at ¶ 4; Doc. 24 at 4 n.3). Plaintiff was originally
24 hired as a clinical and forensic neuropsychologist, and in 2015, she was appointed as the
25 Unit Consultant for DCS's Glendale field office. (Doc. 21 at ¶ 4). In late 2015, following
26 her response to a DCS request for proposal, Plaintiff accepted DCS's offer to provide
27 various psychological evaluation services for its clients. (*Id.*). Plaintiff's contract-at-issue
28 commenced on January 1, 2016. (*Id.*).

1 In February 2016, KNXV, a local television station, reported about Plaintiff's
 2 marriage to Jacob Wideman. (*Id.* at ¶ 16). In 2004, Plaintiff treated Mr. Wideman while
 3 she was a psychology associate employed by the Arizona Department of Corrections and
 4 Mr. Wideman was a prisoner. (*Id.* at ¶¶ 6, 7).¹ In May 2010, Plaintiff became engaged to
 5 Mr. Wideman and married him sometime thereafter. (*Id.* at ¶¶ 9, 14). As part of KNXV's
 6 report, the television station provided DCS with documentation relating to Plaintiff's
 7 marriage. (*Id.* at ¶ 15).

8 Following the KNXV report, DCS terminated Plaintiff's contract effective
 9 February 11, 2016 and informed Plaintiff that the "termination was done in the best
 10 interest of the State." (*Id.* at ¶ 16). Plaintiff alleges that DCS Director Gregory McKay
 11 had direct personal participation in terminating Plaintiff's contract. (*Id.*). Prior to the
 12 termination, Plaintiff "never received any complaints about her job performance." (*Id.*
 13 at ¶ 4).

14 Plaintiff alleges that Defendant McKay, while acting in his individual capacity,
 15 deprived Plaintiff of her "First Amendment Right of Intimate Association and Fourteenth

16
 17 ¹ Defendant attaches a "copy of the February 2016 media reporting by local ABC
 18 television station, KNXV, channel 15" to its Motion to Dismiss as Exhibit 1. (Doc. 23
 19 at 4). Citing to *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001), Defendant
 20 argues that the Court may consider this extrinsic evidence because Plaintiff referenced
 21 the media in her FAC. (Doc. 23 at 3–4). Defendant, however, misreads *Lee*. "As a
 22 general rule, a district court may not consider any material beyond the pleadings in ruling
 23 on a [Federal] Rule [of Civil Procedure] 12(b)(6) motion." *Lee*, 250 F.3d at 688
 (quotations omitted). Under one exception to this rule, however, "a court may consider
 material which is properly submitted as part of the complaint on a motion to dismiss
 without converting the motion to dismiss into a motion for summary judgment." *Id.*
 (quotations omitted). "If the documents are not physically attached to the complaint, they
 may be considered if the documents' 'authenticity . . . is not contested' and 'the
 plaintiff's complaint necessarily relies' on them." *Id.* (quoting *Parrino v. FHP, Inc.*,
 146 F.3d 699, 705–06 (9th Cir. 1998)).

24 Here, Defendant is asking the Court to review evidence that Plaintiff did not attach
 25 to her FAC, and Plaintiff's FAC does not necessarily rely on the information contained in
 26 the evidence. Although a court may take judicial notice of news publications, the Ninth
 27 Circuit Court of Appeals ("Ninth Circuit") has generally restricted notice of these
 28 publications to "indicate what was in the public realm at the time, not whether the
 contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at
 Pasadena*, 578 F.3d 1016, 1022 (9th Cir. 2009) (quoting *Premier Growth Fund v. All.
 Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2001)). Consequently, the Court declines
 to consider the contents of Defendant's Exhibit 1, (Doc. 23-1), in ruling on Defendant's
 Motions.

1 Amendment Liberty Interest in [the] Right to Marry and Right of Privacy” in violation of
 2 42 U.S.C. § 1983 (2012). (*Id.* at 8).²

3 **II. MOTION TO STRIKE**

4 Defendant argues that, pursuant to Federal Rule of Civil Procedure (“Federal
 5 Rule”) 12(f), the Court should strike “from 1:23–3:4, as well as [paragraphs] 10–12 and
 6 []14 of the ‘Factual Allegations’ section of” Plaintiff’s FAC. (Doc. 23 at 7).

7 **A. Legal Standard**

8 Federal Rule 12(f) provides that this Court may strike from a pleading “any
 9 redundant, immaterial, impertinent, or scandalous matter.” While the determination to
 10 strike is in the discretion of the trial court, a motion to strike “should not be granted
 11 unless it is clear that the matter to be stricken could have no possible bearing on the
 12 subject matter of the litigation.” *Colaprico v. Sun Microsystems, Inc.*,
 13 758 F. Supp. 1335, 1339 (N.D. Cal. 1991); *see Yount v. Regent Univ., Inc.*,
 14 No. CV-08-8011-PCT-DGC, 2009 WL 995596, at *11 (D. Ariz. Apr. 14, 2009) (“[E]ven
 15 a properly made motion to strike is a drastic remedy which is disfavored by the courts
 16 and infrequently granted.” (quoting *Int’l Longshoremen’s Ass’n, S.S. Clerks Local 1624*
 17 *v. Va. Int’l Terminals*, 904 F. Supp. 500, 504 (E.D. Va. 1995))).

18 The defendant bears the burden of persuading this Court that the relevant
 19 paragraphs and lines should be stricken. *XY Skin Care & Cosmetics, LLC v. Hugo Boss*
 20 *USA, Inc.*, No. CV-08-1467-PHX-ROS, 2009 WL 2382998, at *1 (D. Ariz.
 21 Aug. 4, 2009). The defendant must show (1) that the material is redundant, immaterial,
 22 impertinent, or scandalous or that the requested relief is unavailable and (2) how such
 23 material will cause prejudice. *Id.*; *see also Am. Buying Ins. Servs., Inc. v. S. Kornreich &*
 24 *Sons, Inc.*, 944 F. Supp. 240, 249–50 (S.D.N.Y. 1996) (noting that motions to strike have
 25 frequently been denied “when no prejudice could result from the challenged allegations,
 26 even though the matter literally is within the categories set forth in [Federal] Rule 12(f)”

27
 28 ² Although Plaintiff includes all three constitutional rights under one count, the Court notes that these are separate constitutional rights with separate legal standards.

1 (quotations omitted)). Any doubt regarding the redundancy, immateriality, impertinence,
2 scandalousness, or insufficiency of a pleading must be decided in favor of the non-
3 movant. *XY Skin Care*, 2009 WL 2382998, at *1.

4 **B. Analysis**

5 Defendant argues that portions of pages 1–3 as well as paragraphs 10–12 and 14 of
6 Plaintiff’s FAC are immaterial and impertinent. (Doc. 23 at 4–7). Defendant alleges that
7 pages 1–3 contain “immaterial case law citations and legal argument” while the specified
8 paragraphs contain “nothing but immaterial and impertinent administrative matters.” (*Id.*
9 at 5–6). In response, Plaintiff argues that the specified portions of her FAC provide
10 pertinent background information, and Defendant has not shown he will suffer any
11 prejudice if the Court denies his Motion to Strike. (Doc. 24 at 2–6).

12 “‘Immaterial’ matter is that which has no essential or important relationship to the
13 claim for relief or the defenses being pleaded.” *Fantasy, Inc. v. Fogerty*,
14 984 F.2d 1524, 1527 (9th Cir. 1993) (quoting 5 Charles A. Wright & Arthur R. Miller,
15 *Federal Practice and Procedure* § 1382, at 706–07 (2d ed. 1990)), *rev’d on other*
16 *grounds*, 510 U.S. 517 (1994). “‘Impertinent’ matter consists of statements that do not
17 pertain, and are not necessary, to the issue in question.” *Id.* (quoting Wright &
18 Miller § 1382, at 711). At this early stage in this proceeding, the Court cannot say that the
19 claims contained in paragraphs 10–12 and 14 have no bearing on the subject matter of the
20 litigation. It is possible that complaints made to the Arizona Board of Psychologist
21 Examiners could have some relevance to Plaintiff’s claims. On the other hand, Plaintiff’s
22 nearly three-page legal argument involving marital rights is immaterial and does not
23 belong in a complaint. However, Defendant has not shown—and has not argued—that
24 these legal arguments and case citations are so prejudicial that they should be stricken
25 pursuant to Federal Rule 12(f). *See Vesecky v. Matthews (Mill Towne Ctr.) Real Estate,*
26 *LLC*, No. CV-09-1741-PHX-JAT, 2010 WL 749636, at *2 (D. Ariz. Mar. 2, 2010)
27 (declining to grant a defendant’s motion to strike because of the defendant’s failure to
28 demonstrate prejudice). Thus, the Court denies Defendant’s Motion to Strike.

1 **III. MOTION TO DISMISS PURSUANT TO FEDERAL RULE 41(B)**

2 Defendant moves to dismiss this action pursuant to Federal Rule 41(b) on grounds
3 that paragraphs 4, 6–9, 14, and 18–19 of Plaintiff’s FAC do not comply with Federal
4 Rules 8(a)(2), 8(d)(1), and 10(b).

5 Dismissal under Federal Rule 41(b) is “a sanction to be imposed only in extreme
6 circumstances.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004).
7 Therefore, a court considering a Federal Rule 41(b) motion to dismiss must consider five
8 factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s
9 need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
10 policy favoring disposition of cases on their merits; and (5) the availability of less drastic
11 alternatives.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). Neither party
12 addresses these factors. Although the Court recognizes Defendant’s argument that
13 Plaintiff did not follow some of the Federal Rules in drafting her FAC, the Court finds
14 that Plaintiff’s noncompliance has not significantly interfered with management of the
15 Court’s docket, the case can be disposed of expeditiously on the merits, and Defendant is
16 unlikely to be prejudiced by denial of his Motion. Thus, the Court denies Defendant’s
17 Federal Rule 41(b) Motion to Dismiss.

18 **IV. MOTION TO DISMISS PURSUANT TO FEDERAL RULE 12(B)(6)**

19 To survive a Federal Rule 12(b)(6) motion for failure to state a claim, a complaint
20 must meet the requirements of Federal Rule 8(a)(2). Federal Rule 8(a)(2) requires a
21 “short and plain statement of the claim showing that the pleader is entitled to relief,” so
22 that the defendant has “fair notice of what the . . . claim is and the grounds upon which it
23 rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*,
24 355 U.S. 41, 47 (1957)). A complaint must also contain sufficient factual matter, which,
25 if accepted as true, states a claim to relief that is “plausible on its face.” *Ashcroft v. Iqbal*,
26 556 U.S. 662, 678 (2009). Facial plausibility exists if the pleader sets forth factual
27 content that allows a court to draw the reasonable inference that the defendant is liable
28 for the misconduct alleged. *Id.* Plausibility does not equal “probability,” but requires

1 more than a sheer possibility that a defendant acted unlawfully. *Id.* “Where a complaint
 2 pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the
 3 line between possibility and plausibility of entitlement to relief.’” *Id.* (citing *Twombly*,
 4 550 U.S. at 557).

5 Although a complaint attacked for failure to state a claim does not need detailed
 6 factual allegations, the pleader’s obligation to provide the grounds for relief requires
 7 “more than labels and conclusions, and a formulaic recitation of the elements of a cause
 8 of action will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). Federal
 9 Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to
 10 relief,” as “[w]ithout some factual allegation in the complaint, it is hard to see how a
 11 claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of
 12 the claim, but also ‘grounds’ on which the claim rests.” *Id.* at 555 n.3 (citing 5 Charles A.
 13 Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1202, at 94–95 (3d ed.
 14 2004)). Thus, Federal Rule 8’s pleading standard demands more than “an unadorned, the-
 15 defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*,
 16 550 U.S. at 555).

17 In ruling on a Federal Rule 12(b)(6) motion to dismiss, a court must construe the
 18 facts alleged in the complaint in the light most favorable to the drafter and must accept all
 19 well-pleaded factual allegations as true. *See Shwarz v. United States*, 234 F.3d 428, 435
 20 (9th Cir. 2000); *see also Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1053
 21 (9th Cir. 2011). However, a court need not accept as true legal conclusions couched as
 22 factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

23 **A. Defendant’s Personal Involvement of Plaintiff’s Constitutional Injury**

24 Defendant contends that Plaintiff’s claims fail because Plaintiff’s FAC “does not
 25 allege facts that show that [Defendant] was personally involved in the deprivation of
 26 [Plaintiff’s] civil rights, nor does [Plaintiff’s FAC] permit this Court to infer more than
 27 the mere possibility that [Defendant] may have been.” (Doc. 23 at 8).

28 Plaintiff brought her claims under 42 U.S.C. § 1983. Section 1983 “has a

causation requirement, with liability extending to those state officials who subject[], or cause[] to be subjected, an individual to a deprivation of his federal rights. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 915 (9th Cir. 2012) (en banc) (quotations omitted). This “requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.” *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir. 1978). The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). However, sweeping conclusory allegations against an official are insufficient to state a claim for relief. *Id.* at 634 (citation omitted).

Here, Plaintiff has alleged:

Plaintiff is informed and believes and therefore alleges that Defendant McKay participated in, directed, set in motion, acquiesced in, was consulted about, participated in, knew of, ratified or approved the termination of Plaintiff’s contractual relationship with DCS and therefore had direct personal participation in the deprivation of Plaintiff’s constitutional rights of freedom of intimate association, Fourteenth Amendment liberty interest in the right to marry and right of privacy.

(Doc. 21 at ¶ 16). Taking Plaintiff’s allegations as true, Plaintiff’s injury—her termination due to public revelations of her marriage—is directly traceable to Defendant, who was serving as DCS’s Director at the time of her injury. The Court finds that Plaintiff’s claims against Defendant sufficiently allege personal conduct.

B. Defendant’s Qualified Immunity

In the alternative, Defendant argues that Plaintiff’s § 1983 claims fail because he is protected by qualified immunity. (*See* Docs. 23 at 9–14; 25 at 1–11). The doctrine of qualified immunity insulates government agents from liability for actions taken in good faith while exercising discretionary authority in their official capacity. *Sonoda v.*

1 *Cabrera*, 255 F.3d 1035, 1042 (9th Cir. 2001). In a suit against a government official
2 under § 1983, a court performs a two-part analysis. To succeed on such a claim, a
3 plaintiff must show, “first, [that she] suffered a deprivation of a constitutional or statutory
4 right; and second [that such] right was clearly established at the time of the alleged
5 misconduct.” *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016) (quoting *Taylor*
6 *v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam)). A court may decide for itself
7 which step of the analysis to address first, for failure on either step will negate a
8 plaintiff’s ability to recover. *Id.* at 1090. Therefore, if a court determines that the
9 constitutional right was not clearly established at the relevant time, the court will grant
10 the defendant government official’s motion to dismiss. *See Pearson v. Callahan*,
11 555 U.S. 223, 236 (2009); *see also Hamby*, 821 F.3d at 1090.

12 A right is “clearly established” when “the contours of the right [are] sufficiently
13 clear that a reasonable official would understand that what he is doing violates that right.”
14 *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The inquiry of whether a constitutional
15 right was clearly established must be undertaken in light of the specific context of the
16 case, not as a broad general proposition. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).
17 While “officials can still be on notice that their conduct violates established law even in
18 novel factual circumstances,” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), the Supreme
19 Court has clarified that a government official is entitled to qualified immunity unless
20 existing case law “squarely governs the case here,” *Mullenix v. Luna*, 136 S. Ct. 305, 309
21 (2015) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per
22 curiam)). In pursuing this inquiry, a court looks first to Supreme Court and Ninth Circuit
23 law existing at the time of the alleged act. *Osolinski v. Kane*, 92 F.3d 934, 936
24 (9th Cir. 1996). In the absence of binding precedent from the appellate level, a court
25 should look to available decisions of other circuits and to district courts within its own
26 circuit to ascertain whether the law is clearly established. *Id.*

1 1. **Right to Intimate Association**³

2 Defendant argues that the Court should dismiss Plaintiff’s § 1983 intimate
3 association claim because this right was not clearly established “in the specific context of
4 this case.” (Doc. 23 at 13). The Supreme Court has recognized that the U.S. Constitution
5 offers protection for two types of associations: (1) the right to expressive association; and
6 (2) the right to intimate association. *See Bd. of Dirs. of Rotary Int’l v. Rotary Club of*
7 *Duarte*, 481 U.S. 537, 544 (1987) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–
8 20 (1984)). The right to expressive association protects the right to associate with others
9 “for the purpose of engaging in those activities protected by the First Amendment—
10 speech, assembly, petition for the redress of grievances, and the exercise of religion.”
11 *Roberts*, 468 U.S. at 617–18. On the other hand, the right to intimate association protects
12 “choices to enter into and maintain certain intimate human relationships . . . against
13 undue intrusion by the State because of the role of such relationships in safeguarding the
14 individual freedom that is central to our constitutional scheme.” *Id.* at 617–18.

15 Although it is well-settled that the right to expressive association is protected by
16 the First Amendment, *see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*,
17 547 U.S. 47, 68 (2006), “nature and the extent of the right are hardly clear, and . . . the
18 source of the intimate association right has not been authoritatively determined”,
19 *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 61 (2d Cir. 2014) (quotations omitted).
20 Nonetheless, the Ninth Circuit has held that the right to intimate association is protected
21 by the Fourteenth Amendment’s Due Process Clause. *See IDK, Inc. v. Cty. of Clark*,
22 836 F.2d 1185, 1192 (9th Cir. 1988) (“In protecting certain kinds of highly personal
23 relationships, the Supreme Court has most often identified the source of the protection as

24
25 ³ Plaintiff conflates the right to intimate association with the right to marry and
26 right to privacy. In fact, besides the case law and vague legal reasoning Plaintiff wrongly
27 incorporated within her FAC, Plaintiff’s pleadings contain no analysis of the
28 constitutional right to marry. (*See* Doc. 24 at 11–16). For the reasons stated below, the
Court believes the right to intimate association and the right to marry are distinct. *See*
also *Quiroz v. Short*, 85 F. Supp. 3d 1092, 1107–12 (N.D. Cal. 2015) (analyzing the right
to intimate association and the right to marry separately). Thus, although Plaintiff does
not supply separate arguments, the Court presents its analysis for each right separately.

1 the due process clause of the fourteenth amendment, not the first amendment’s freedom
 2 to assemble.” (citing *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978))). *But see Adler v.*
 3 *Pataki*, 185 F.3d 35, 44 (2d Cir. 1999) (“Though the matter is not free from doubt, we
 4 think a spouse’s claim that adverse action was taken solely against that spouse in
 5 retaliation for conduct of the other spouse should be analyzed as a claimed violation of a
 6 First Amendment right of intimate association.”); *Adkins v. Bd. of Educ. of Magoffin Cty.,*
 7 *Ky.*, 982 F.2d 952, 955–56 (6th Cir. 1993) (recognizing a right to intimate association
 8 under the First Amendment); *Singleton v. Cecil*, 133 F.3d 631, 635 (8th Cir. 1998)
 9 (same); *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 615–16 (11th Cir. 1995)
 10 (same).

11 As with the right to privacy, the Supreme Court and Ninth Circuit have not
 12 definitively prescribed the extent of constitutional protections for abridgements of the
 13 right to intimate association within public employment. *See, e.g., Hollenbaugh v.*
 14 *Carnegie Free Library*, 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting) (dissenting
 15 from the denial of certiorari where the district court had upheld a public employer’s
 16 decision to discharge a librarian and custodian for cohabitating in an adulterous
 17 relationship and recognizing that the Court has “never demarcated the precise boundaries
 18 of this right [to privacy]”). However, the Supreme Court has generally recognized greater
 19 deference towards the government when it acts as an employer. *See Waters v. Churchill*,
 20 511 U.S. 661, 675 (1994) (plurality opinion) (“The government’s interest in achieving its
 21 goals as effectively and efficiently as possible is elevated from a relatively subordinate
 22 interest when it acts as sovereign to a significant one when it acts as employer.”).

23 Here, Plaintiff argues that her right to intimate association with her husband was
 24 so clearly established that a reasonable official would have understood that Defendant’s
 25 conduct violated that right given the specific factual context. (Doc. 24 at 11–16). In
 26 support of this argument, however, Plaintiff cites to no Supreme Court or Ninth Circuit
 27 precedent. Instead, Plaintiff first cites to *Adler v. Pataki*, in which the Second Circuit
 28 Court of Appeals (“Second Circuit”) held that a plaintiff-employee stated a valid claim

1 against a New York State public agency that terminated him because his wife filed a
2 lawsuit against the New York Attorney General. 185 F.3d at 44–45. However, unlike the
3 Ninth Circuit, the Second Circuit based its analysis on a First Amendment right of
4 intimate association because the agency’s “adverse action was taken solely against [the
5 plaintiff] in retaliation for *conduct* of the other spouse.” *Id.* at 44 (emphasis added). Here,
6 unlike in *Adler*, Plaintiff has not alleged any conduct by her spouse that motivated
7 Defendant’s action. Instead, Plaintiff has only claimed that her marriage to Mr. Wideman
8 was the sole catalyst for Defendant’s decision. (Doc. 21 at ¶ 19).

9 The other cases Plaintiff cites involve similar factual contexts as *Adler* and are,
10 thus, quite different from the facts presented in Plaintiff’s case. For example, Plaintiff
11 cites to *Adkins v. Board of Education of Magoffin County, Kentucky*, in which a school
12 superintendent refused to recommend a plaintiff for continued employment within the
13 school district because plaintiff’s husband, a principal within the district, failed to follow
14 the superintendent’s commands. 982 F.2d at 953. Plaintiff also cites to *Sowards v.*
15 *Loudon County, Tennessee*, in which sheriff’s department employees retaliated against
16 the plaintiff because the plaintiff’s husband was a candidate for sheriff.
17 203 F.3d 426, 430–31 (6th Cir. 2000). Finally, Plaintiff cites to *Gray v. Bruneau-Grand*
18 *View School District No. 365*, in which a school district retaliated against a plaintiff after
19 the plaintiff’s husband objected to a school district policy. No. CV-06-069-S-BLW,
20 2007 WL 1381785, at *1 (D. Idaho Mar. 27, 2007). In all of these cases, as in *Adler*, it
21 was the plaintiff’s spouse’s conduct—e.g., the spouse’s failure to follow the
22 superintendent’s requests, the spouse’s candidacy for sheriff, or the spouse’s objection to
23 a district policy—that led defendants to retaliate against the plaintiff. Here, Plaintiff has
24 solely alleged that her marriage to Mr. Wakeman was the reason Defendant allegedly
25 retaliated against her. (Doc. 21 at ¶ 19). Plaintiff has not cited, and the Court has not
26 found, any case where retaliation based solely on a marriage—and not the conduct of a
27 spouse—has been found to violate a right to intimate association. Thus, Plaintiff has
28 failed to show that her rights were clearly established.

1 The Court finds that, regardless of whether Plaintiff has established a violation of
 2 her Fourteenth Amendment right to intimate association, Defendant is entitled to
 3 qualified immunity on this claim because Plaintiff's rights were not clearly established at
 4 the time of Defendant's alleged retaliation.

5 **2. Right to Marry**

6 Plaintiff also asserts that Defendant's alleged retaliation against Plaintiff on the
 7 basis of her marriage violated her constitutional right to marry. (Doc. 21 at 8–9).
 8 Defendant again argues that he is entitled to qualified immunity because Plaintiff's right
 9 to marry was not clearly established in this specific factual context. (Doc. 23 at 13).

10 The Supreme Court has recognized that the right to marry is part of the
 11 fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process
 12 Clause. *Zablocki*, 434 U.S. at 384. "While the outer limits of [the right of personal
 13 privacy] have not been marked by the [Supreme] Court, it is clear that among the
 14 decisions that an individual may make without unjustified government interference are
 15 personal decisions 'relating to marriage'" *Id.* at 385. However, in order to implicate
 16 the right to marry, a plaintiff must demonstrate that a defendant's action directly and
 17 substantially impaired that right. *See Parsons v. Del Norte Cty.*, 728 F.2d 1234, 1237
 18 (9th Cir. 1984) (per curiam) ("Only when a government regulation directly and
 19 substantially interferes with the fundamental incidents of marriage is such strict scrutiny
 20 applicable. Where fundamental rights are not substantially burdened the regulation will
 21 be upheld unless there is no rational basis for its enactment." (citing *Zablocki*, 434 U.S.
 22 at 386; *Califano v. Jobst*, 434 U.S. 47, 53–54 (1978))).

23 The Supreme Court has "intimated that conduct less than 'a direct legal obstacle'
 24 to an individual's choice to marry did not trigger a fundamental right" to marry. *Quiroz*,
 25 85 F. Supp. 3d at 1111. In cases in which the Supreme Court has recognized a
 26 "substantial burden" on the right to marry, the government regulation at issue has been a
 27 complete ban on marriage. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015)
 28 (holding that statutes banning same-sex marriage substantially burdened the plaintiff's

1 right to marry); *Zablocki*, 434 U.S. at 384 (holding that a statute forbidding noncustodial
 2 parents with child support obligations from marrying without first obtaining court
 3 permission substantially burdened the plaintiff's right to marry); *Loving v. Virginia*,
 4 388 U.S. 1 (1967) (holding that a statute prohibiting all interracial marriage substantially
 5 burdened the plaintiff's right to marry).

6 Here, Plaintiff's right to marry was not clearly established given the specific facts
 7 of this case. Plaintiff has cited to no case law indicating that Defendant's allegedly
 8 retaliatory action substantially burdened Plaintiff's right to marry. To the contrary, case
 9 law appears to recognize no substantial burden in cases where government action simply
 10 "touches upon the incidents of marriage" rather than prohibiting marriage. *Parsons*,
 11 728 F.2d at 1237; *see also Jobst*, 434 U.S. at 58 (holding no substantial interference with
 12 the plaintiff's right to marry where the government terminated a disabled dependent
 13 child's Social Security benefits after plaintiff married someone ineligible for benefits).
 14 Moreover, Plaintiff has failed to state any facts indicating any burden on—let alone the
 15 dissolution of—Plaintiff's marriage to Mr. Wideman. Thus, under these facts, Plaintiff
 16 has failed to show that her rights were clearly established.

17 The Court finds that, regardless of whether Plaintiff has established a violation of
 18 her Fourteenth Amendment right to marry, Defendant is entitled to qualified immunity on
 19 this claim because Plaintiff's rights were not clearly established at the time of
 20 Defendant's alleged retaliation.

21 **3. Right to Privacy**

22 Plaintiff finally asserts that Defendant's alleged retaliation against Plaintiff
 23 violated her constitutional right to privacy. (Doc. 21 at 8–9). Defendant again argues that
 24 he is entitled to qualified immunity because Plaintiff's right to privacy was not clearly
 25 established in this specific factual context. (Doc. 23 at 13).

26 The Supreme Court has recognized a right to privacy implicit within the
 27 Fourteenth Amendment's Due Process Clause. *Griswold v. Connecticut*,
 28 381 U.S. 479, 485–86 (1965). The Court has since recognized that the right to privacy

1 involves “at least two different kinds of interests.” *Whalen v. Roe*, 429 U.S. 589, 599
2 (1977). “One is the individual interest in avoiding disclosure of personal matters, and
3 another is the interest in independence in making certain kinds of important decisions.”
4 *Id.* at 599–600; *see also Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977). The
5 first interest—a right to informational privacy—is the interest at issue here. Since *Whalen*
6 and *Nixon*, however, the Supreme Court “has said little else on the subject of an
7 individual interest in avoiding disclosure of personal matters.” *NASA v. Nelson*,
8 562 U.S. 134, 135 (2011).

9 Case law on the issue of privacy interests related to the disclosure of personal
10 information is “murky at best.” *O’Phelan v. Loy*, Civil No. 09-00236 SOM/KSC,
11 2011 WL 719053, at *11 (D. Haw. Feb. 18, 2011). The Ninth Circuit has recognized a
12 right to informational privacy in a number of factual circumstances. *See, e.g., Planned*
13 *Parenthood of S. Ariz. v. LaWall*, 307 F.3d 783, 789–90 (9th Cir. 2002) (recognizing a
14 female minor’s protected privacy interest in her pregnancy status as part of a judicial
15 bypass proceeding used as an alternative to parental consent); *In re Crawford*,
16 194 F.3d 954, 958 (9th Cir. 1999) (recognizing a protected privacy interest in social
17 security numbers); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269–
18 70 (9th Cir. 1998) (recognizing a protected privacy interest for an employer’s
19 nonconsensual preemployment blood test); *Doe v. Attorney Gen. of the U.S.*,
20 941 F.2d 780, 796 (9th Cir. 1991) (recognizing a protected privacy interest for a
21 physician’s HIV-AIDS status); *Thorne v. City of El Segundo*, 726 F.2d 459, 468–69 (9th
22 Cir. 1983) (recognizing a police officer’s protected privacy interest in answers given
23 during a polygraph examination on the subject of abortions and the identity of past sexual
24 partners). Where there is no previously recognized protected privacy interest, the Ninth
25 Circuit has noted that “if the existence of a right or the degree of protection it warrants in
26 a particular context is subject to a balancing test, the right can rarely be considered
27 ‘clearly established’ at least in the absence of closely corresponding factual and legal
28 precedent.” *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989) (quoting *Myers v.*

1 *Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987)).

2 Here, Plaintiff has cited to no cases and no facts implicating a protected privacy
3 interest. Plaintiff claims a privacy interest in the existence of her marriage, which is a
4 matter of public record. *See generally Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95
5 (1975) (recognizing that an interest in privacy fades when information is in the public
6 record). Moreover, Plaintiff has not cited to any case recognizing a protected privacy
7 interest for one’s marital status. Thus, under these facts, Plaintiff has failed to show that
8 her rights were clearly established.

9 The Court finds that, regardless of whether Plaintiff has established a violation of
10 her Fourteenth Amendment right to privacy, Defendant is entitled to qualified immunity
11 on this claim because Plaintiff’s rights were not clearly established at the time of
12 Defendant’s alleged retaliation.

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